

Recognizing Guarantees and Assurances of Non-Repetition: *LaGrand* and the Law of State Responsibility

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Looking back at the *LaGrand* judgment some time after the decision has been rendered, one cannot help but wonder that a dispute of such limited scope should have prompted the International Court of Justice (ICJ) to address so many issues of general relevance. The most spectacular among these would certainly be the ICJ's authoritative decision on the legal status of interim orders under Article 41 of the ICJ Statute, and its recognition that Article 36 (1)(b) of the Vienna Convention on Consular Relations protects rights of the individual. Important as they are, however, it would be unfortunate if these findings overshadowed some of the other, less spectacular, aspects of the decision. One of these is the court's progressive development of the law of state responsibility. In fact, in the last part of the *LaGrand* judgment, the court has taken the opportunity to influence, if not direct, the legal rules governing consequences of international wrongs. It has done so by recognizing that a state injured by a breach of international law may be entitled to demand from the breaching state guarantees and assurances that the breach will not be repeated.

That this issue arose at all was due to the factual peculiarities of the case. In Germany's view, none of the traditionally accepted forms of reparation was sufficient to remedy the injury caused by the United States. After the execution of Walter LaGrand, Germany could no longer sensibly uphold its initial claim for restitution in the form of the annulment of the national judgments. Since there was no evidence of material losses, no claims for compensation had been brought. The United States was willing to provide satisfaction in the form of formal apologies, but this seemed insufficient. German counsel argued that there was a need for "a system which does not automatically reproduce violation after violation of the Vienna Convention, only interrupted by the apologies of the United States

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Government.”¹ In addition to apologizing, the United States would thus have to take concrete steps to ensure¹ that the violation would not be repeated. The United States vigorously denied that such claims for guarantees and assurances of non-repetition were an accepted remedy under international law and argued that, in any event, by informing state authorities about the rights of foreigners under the Vienna Convention, it had already demonstrated its commitment to prevent future violations.

In one of the more remarkable passages of the judgment, the ICJ largely granted the German claim, holding that,

[A]n apology is not sufficient in this case [of the LaGrand brothers], as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.²

In these cases, the United States was under a duty to “allow review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.”³

Unfortunately, the court did not specify the exact content of this duty, leaving the choice of means to the United States. In terms of securing the implementation of the judgment within the United States, this may have been a mistake. As Professors Fitzpatrick and Quigley demonstrate in their contributions to this symposium, U.S. courts, including the Supreme Court, have been reluctant to grant meaningful remedies for those claiming a violation of Article 36(1) of the Vienna Convention.⁴ A clear statement by the ICJ prescribing the means by which the United States would have to “allow review and reconsideration” might have, therefore, been preferable.

From an international law perspective, however, it would be wrong to criticize the ICJ's holding as unduly vague. For a start, the decision means that the United States is under a legal duty to take positive measures in order to put into place a system enabling foreign citizens and states to protect their rights under the Vienna Convention. The *LaGrand* judgment makes clear that under Article 36 of the Vienna Convention, national courts cannot simply dismiss claims of individuals whose right to consular notification has been disregarded. The judgment expressly states that in future cases where convictions are obtained following a failure to provide consular notification under the Convention, “it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.”⁵ Given that

1. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. ¶ 83 (June 27), available at <http://www.icj-cij.org>.

2. *Id.* ¶ 123.

3. *Id.* ¶ 125.

4. See Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT'L L. 427, 428 (2002); John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT'L L. 435, 436 (2002).

5. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. ¶ 125 (June 27), available at <http://www.icj-cij.org>.

the United States had argued that Article 36 did not impose *any* duties relating to subsequent review procedures before criminal courts, this should not be discounted lightly.

More importantly, by prescribing how the United States would have to perform its obligations in the future, the court has recognized Germany's right to demand guarantees and assurances of non-repetition from the United States. Given the paucity of previous state practice supporting such claims for guarantees and assurances, this—at least from a conceptual point of view—is a surprisingly clear finding. Bearing in mind the parties' submissions, it is particularly surprising that the court apparently did not feel the need to elaborate in detail why guarantees and assurances were due, or whether it was competent to award them. The court's decision raises the usual warnings about judicial activism. A full rebuttal of these concerns is beyond the scope of this commentary, so I will limit myself to noting that in its Articles on State Responsibility, adopted shortly after the *LaGrand* judgment, the International Law Commission has fully endorsed the court's decision on guarantees and assurances.⁶

I believe that it is more fruitful to focus on the *implications* of the recognition of guarantees and assurances. No doubt caution is required, but it seems safe to say that this recognition could indeed mark a trend towards a broader approach to the law of state responsibility. By recognizing, for the first time, a state's right to obtain guarantees and assurances of non-repetition, the court has accepted a remedy that is not only new, but also qualitatively different from the traditionally accepted forms of reparation. As is clear from the term itself, "reparation" as the prime consequence of international wrongs is concerned with the restoration of the status quo, and with remedying the effects of past wrongs. Of course, as a side-effect, one would hope that the duty to provide reparations deters the wrongdoing state from committing future breaches. But primarily, it is restorative, or backward-looking. This in turn has tended to reinforce a bilateral understanding of responsibility: restitution, compensation, and satisfaction aim at restoring the status quo *in relation to the injured state*. Multilateral perspectives on international law are lost; this restorative approach to responsibility disregards the general concern of all states in the observation of international law.

In contrast, guarantees and assurances of non-repetition as recognized in *LaGrand* serve a different function. Unlike restitution, compensation or satisfaction, they are forward-looking; not concerned with *remedying past wrongs*, but with *preventing future breaches*. By recognizing this remedy, the judgment seems to move away from a purely restorative approach to responsibility. The court acknowledges that in specific situations, the main

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6. International Law Commission, Articles on State Responsibility, *reprinted in* Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. GAOR, 53d Sess., Supp. No. 10, at 219-22, U.N. Doc. A/56/10 (2001).

function of responsibility can be, as the International Law Commission put it in the Articles on State Responsibility, to restore "confidence in a continuing relationship."⁷ This is a welcome readjustment, since it enables states to make claims that directly aim at preserving the integrity of legal relations.

Moreover, in situations involving breaches of general international law or multilateral treaties (such as the Vienna Convention), a future-oriented obligation to prevent future breaches can hardly be limited to bilateral legal relations between injured and responsible states. Although under Article 59 of the ICJ Statute the court's judgment formally is only binding *inter partes*, judgments awarding guarantees and assurances of non-repetition will have a more general impact on a legal situation. It is hard to imagine that in future disputes U.S. courts should distinguish between cases involving Germans and other foreign nationals. In the quotation above, the ICJ itself seems to admit as much when holding that "an apology is not sufficient in this case, *as it would not be in other cases where foreign nationals have not been advised . . . of their rights . . .*"⁸ President Guillaume's declaration similarly acknowledges that while the *dispositif* of the judgment could only refer to German nationals, there was "no question of applying an *a contrario* interpretation."⁹ In other words, where a state is under a duty to adopt changes to its existing laws and regulations, the fiction underlying Article 59 of the ICJ Statute will become more difficult to uphold.

To sum up, by recognizing, for the first time, that states may be entitled to obtain guarantees and assurances of non-repetition, the court may have opened the door for a broader approach to state responsibility in international law. The events that led to the institution of proceedings by Germany against the United States were regarded by many as tragic. However, those who were frustrated in March 1999 by the court's inability to prevent the execution of Walter LaGrand may find it comforting that the court's judgment progressively develops and strengthens the preventive function of the law of remedies. While the case has come too late to protect the individuals whose name it bears, it will help solve future cases involving the right to consular notification in a less confrontational manner. This is good news since, of all issues, the question of capital punishment does not lend itself to being solved in a restorative way.

7. *Id.* at 219.

8. *LaGrand*, 2001 I.C.J. ¶ 123 (emphasis added).

9. *Id.* (declaration of President Guillaume).